



**Nielsen v Steyn aka Hermannus Phillipus Steyn & 2 others (Civil Case 332 of 2010)
[2024] KEHC 13290 (KLR) (Commercial and Tax) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 332 OF 2010
AA VISRAM, J
OCTOBER 31, 2024**

BETWEEN

JAN BONDE NIELSEN PLAINTIFF

AND

**HERMAN PHILIPUS STEYN AKA HERMANNUS PHILLIPUS
STEYN 1ST DEFENDANT
HEDDA STEYN 2ND DEFENDANT
NGURUMAN LIMITED 3RD DEFENDANT**

RULING

1. What is before the court for determination is the Notice of Motion dated 27th July, 2021, filed by the 1st and 2nd Defendants (“the Defendants”) under sections 1, 1A, 1B, 3A and 27 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 26 Rules 1, 4, 5 and 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 principally seeking that the Plaintiff be ordered to pay security for costs for the Defendants of United States Dollars One Million Five Hundred Thousand (USD 1,500,000.00/=) or any other sum the court deems fit, to be deposited into a joint interest earning account to be opened by the Advocates herein, and that such sum to be so deposited within thirty (30) days of the Order, and to remain on deposit until the instant suit and any appeals arising therefrom are heard and finally determined. Further, that this suit be struck out with costs in the event of default of the provision of the said security within the prescribed time.
2. The application is supported by grounds set out on its face together with the supporting affidavit sworn on 27th July, 2021, by the Defendants’ son, Martin Richard Steyn. The Plaintiff opposes the application through his replying affidavit sworn on 23rd November, 2023. In addition to the pleadings, the parties’



counsel supplemented their arguments by way of written and oral submissions which I have considered and will make relevant references to in my analysis and determination later on.

The Application

3. The Defendants contend that the alleged cause of action that the Plaintiff seeks to pursue relates to matters and events that occurred over 20 years before the filing of the instant proceedings, and that there are huge sums of money involved in the instant suit with associated, and expensive litigation costs. Further, that the Plaintiff is a citizen of Denmark, who resides overseas, and has no known residential address or place of business within the Republic of Kenya. Nor does he have any known assets in Kenya, or anywhere in the world, that could satisfy any order for costs if such an order was ultimately made in favour of the Defendants herein.
4. The Defendants claim that the Plaintiff has already failed, neglected or refused to pay them their taxed costs in an interlocutory matter arising from the instant proceedings, namely the costs awarded to them in Nairobi Civil Appeal No. 77 of 2012; *Nguruman Ltd vs. Jan Bonde Nielsen & 2 Others* amounting to Kshs. 644,805.00/= and Kshs. 653,362.50/= for the 3rd Defendant, despite numerous requests for payment of the same.
5. The Defendants contend that they have been unable to recover the said costs because the Plaintiff has no assets and argue that he has as a documented history of not paying his debts. They pointed out that he was declared bankrupt in Denmark on 28th November, 1980, with debts of approximately USD 10,700,000/= and that his creditors lost the entire amount. He was also declared bankrupt in the United Kingdom by way of an Individual Voluntary Arrangement, which ran from 3rd December, 1996, until sometime in 2003, with debts of GBP 43,352,529/= against no assets; with the Plaintiff ultimately repaying less than 1% of the debts.
6. The Defendants further claim that the Plaintiff has a history of moving between jurisdictions to avoid the reach of the law. That he was charged by the Danish Government with various criminal offences including "obtaining property by deception", "fraud by a director of a company", "theft, procuring the execution of valuable securities by deception, publishing misleading, false or deceptive statements and false accounting". As a result, he fled to England and chose to remain in exile in England as a wanted fugitive for over nine (9) years, ostensibly to keep away from the reach of the law in Denmark. They accuse him of bringing these proceedings not in his personal capacity, but on behalf of third parties, not present before the Court.
7. The Defendants aver that the Plaintiff's approbation and reprobation by the introduction of an entirely new case has necessitated the Defendants to amend their defences at a late stage in the proceedings, thereby causing embarrassment, increasing costs and time, and being tantamount to abuse of process of the Court.
8. The Defendants aver that even at this stage of the proceedings, it remains unclear who the real owner of the cause of action is, and instead of clearly identifying the same, the Plaintiff has referred the Defendants and the Court to an amorphous group of foreign trusts and companies, all of which appear to have been wound up many years before this suit was instituted. As such, the Defendants are apprehensive that if unsuccessful, it is clear that the Plaintiff would be unable to pay the costs due to financial constraints.
9. Further, that due to the absence of any known assets owned by the Plaintiff within the court's jurisdiction; the Plaintiff's inability to pay costs; his financial standing; lack of a bona fide claim; his conduct during these proceedings; and the strength of the Defendants' case, the court ought to exercise its discretion in favour of an order for security of costs.



10. The Defendants submitted that it is just and fair that they be allowed to have insurance for the huge amounts of money that have been, and are to be spent, in the defence of this matter and its incidentals, before subjecting the Defendants to more cost and expense. They urged the court to accept that in the event that the Orders sought herein are not granted, severe injustice will be occasioned to the Defendants in the event that the Plaintiff's claim fails at the trial of the instant matter, leaving the Defendants herein unable to recover the costs incurred.

The Plaintiff's Reply

11. The Plaintiff deposed that the application, belatedly and inexplicably brought more than 11 years since he commenced this action, and after this suit was fixed for hearing by consent of parties, is the continuation of the Defendants' tactics of employing every possible means to ensure that there is no adjudication of his claim(s) against them. That the Defendants are well aware that even though the Plaintiff is a citizen of Denmark, he has been primarily a resident of Kenya, and presently based at the address given in his deposition.
12. The Plaintiff avers that he now spends all of his time in Kenya; for example, during the past two years, he has been in Kenya during the following periods:-
- a. 29th December 2019 to 21st February 2020
 - b. 7th September 2021 to 22nd November 2021
 - c. 28th November 2021 to 8th June 2022
 - d. 12th August 2022 to 19th March 2023
 - e. 22nd March 2023 to 27th September 2023; and
 - f. 28th September 2023 to date.
13. The Plaintiff asserted that he has already formalized his legal status in Kenya having applied and acquired an investor's permit, namely, permit number 147606. It was his further position that there is also an order of costs in his favour against the Defendants in relation to another interlocutory appeal in relation to a ruling of the Court i.e. Civil Appeal No. 266 of 2015; Nguruman Limited v Jan Bonde Nielsen & two others, and that the costs awarded against him should be set-off against the costs awarded in his favour. He contended that the Defendants have also not paid costs in Civil Appeal No. 118 of 2011; Nguruman v Ol Donyo Laro Estates Limited, which was dismissed with costs. He pointed out that Messrs. LJA Advocates, the law firm acting for the Plaintiff, wrote to Messrs. Ahmed Nassir & Company Advocates seeking settlement of costs of Kshs. 409,135.00/=, which to date is yet to be settled. In his view, the said letter is what provoked the filing of the present application.
14. The Plaintiff argued that the cause of action in these proceedings accrued in 2009, when for the first time, the 1st Defendant denied his interest in the subject matter through his email of 27th March, 2009, and that it was only after efforts to settle the matter amicably, and following an armed invasion, that he instituted these proceedings in 2010, which was within any applicable limitation period.
15. He accused the Defendants of making repeated averments in the vain hope that the repetition, despite prior demonstration of their inaccuracy and falsity, will make them stick. The Plaintiff stated that he has fully addressed these matters exposing the misleading half-truths, unjustified conjectures, as well as outright fabrications on which those allegations rest in his previous affidavits
16. He submitted that it is ironical, to say the least, that while in these proceedings, the Defendants claim that there is a chance that he will be unable to pay the costs of this suit should it fail, yet they have filed



various suits against him claiming substantial damages as well as other reliefs. For these reasons, the Plaintiff urges the court to dismiss the application.

Analysis and Determination

17. I have considered the grounds on the face of the application; the response to the same as contained in the replying affidavit; the relevant submissions of the parties; and the applicable law.
18. The Defendants submitted that the issue for the court's determination is whether the Court ought to grant an order for security for costs in the sum of USD 1,500,000.00/= or any other sum that the Court deems fit?
19. The law governing security of costs is set out under Order 26 of the Civil Procedure Rules which provides as follows:-
 - “ 1. In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party.
 2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out defence the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.
 3. Where it appears to the court that the substantial issue is which of two or more Defendants is liable or what proportion of liability two or more Defendants should bear no order for security for costs may be made.
 4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.
 5.
 - (1) If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.
 - (2) If a suit is dismissed under subrule (1) and the Plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.
 6.
 - (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the Defendant or in the names of their respective advocates when advocates are acting.”
20. Reading the above, it is evident that the said Order provides for a discretionary power of the court in the exercise or grant of an order for security for costs.



21. The purpose of a grant of such an order was outlined in *Patrick Ngetakimanzi vs Marcus Mutuamuluvi & 2 Others- High Court Election Petition No. 8 of 2013* it was held that: -

“ Security of costs ensures that the Respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the Respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.” (emphasis mine)

22. Further in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court emphasized that:-

“In an application for security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

23. More recently, the Supreme Court of Kenya in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) outlined some of the guiding principles to take into account when making an order for security for costs in the following terms:-

63. ..Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –

- i. the prospects of success or merits of the proceedings,
- ii. the genuineness of the proceedings
- iii. the impecuniosity of the Plaintiff
- iv. whether the Plaintiff's impecuniosity is attributable to the Defendant's conduct
- v. whether the Plaintiff is effectively in the position of a Defendant
- vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice
- vii. whether the proceedings involve a matter of public importance
- viii. whether there has been an admission or payment in court
- ix. whether delay by the Plaintiff in commencing the proceedings has prejudiced the Defendant
- x. the costs of the proceedings
- xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute
- xii. the timing of the application for security for costs



- xiii. whether an order for costs made against the Plaintiff would be enforceable within the republic of Kenya
- xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident Plaintiff or Appellant
- xv. if the Plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
- xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct
- xvii. if the Plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the Plaintiff's claim for relief in the proceedings be dismissed.
- xviii. the provisions of any Act under which the court may require security for costs to be given such as the [Elections Act](#)
- xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a Plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
- xx. the Defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.
- xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a court ought to take into consideration several factors before making an order for security for costs. [My emphasis]

24. I wish to reiterate, that the factors outlined above are a non-exhaustive list. The words and "... such other matters as it considers relevant" stated above are evidence of the same. Therefore, I am of the view that this court may also consider additional factors that it deems relevant based on the facts of the case, and the additional case law that may be relevant.



25. In *Shah vs Shah* [1982] KLR 95 the court outlined the ‘general rule’ in the following terms:-

“The general rule is that security is normally required from Plaintiff’s resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given” (emphasis mine).

26. In the present suit, it is not in dispute that the Plaintiff is a foreigner resident with no known assets within the jurisdiction. As regards his residency, the Respondent stated that he has procured an investor visa, and that he spends some of his time in Kenya, and some of his time abroad. He is however a Danish National, whose permanent residence is in Denmark, and not in Kenya.
27. Given that in an application for security of costs the court is required to consider the place of residence of the Plaintiff and his ability to pay costs. It is therefore relevant that the Respondent was declared bankrupt in Denmark; and was the subject of insolvency proceedings in the United Kingdom (IVA).
28. Upon inquiry by the court in relation to whether the Plaintiff has any known assets within Kenya, counsel was of the view that the said inquiry was irrelevant, and was not a ground for consideration in such an application. In Counsel’s view, the said inquiry had not been listed as a consideration in *Westmont Holdings* (supra) and therefore, the Plaintiff was not obliged to state if he had any such assets within Kenya. Respectfully, I disagree. The ‘general rule’ as set out above remains applicable and the inquiry is valid especially based on the facts of the present matter.
29. Further, Counsel was emphatic that the test for the grant of the order sought requires proof that Respondent would be unable to pay costs due to poverty. He was of the opinion that the previous bankruptcy on the part of the Plaintiff “cannot be evidence of his financial position now or inability to meet any order of costs that might be made against him”. While I accept this line of reasoning, nothing would have been easier than for the Respondent to furnish some evidence as regards his present financial standing. Especially so, in light of the Respondent’s history of financial trouble in the UK and Denmark.
30. In this regard, the Respondent ought to have, but failed to allay the Defendants fears by producing any financial records or business registration documents before this court as proof of his financial wellbeing and or ability to meet costs. I do however take note that Counsel for the Plaintiff pointed, and the Defendant did not deny, that the Defendant owed the Plaintiff costs arising out of previous proceedings, which he submitted, ought to be offset against costs owing to the Applicant. He further argued that it was absurd for the Defendants to sue the Plaintiff in other legal proceedings for damages if the Plaintiff truly had no assets.
31. I am not persuaded by the second line of reasoning in the argument above, the same is speculative and without evidentiary basis. Moreover, the details of the other proceedings referred to by the Plaintiff are not before this court. Based on the unique facts and history of the Plaintiff, I am of the view that while the burden of proof ordinarily rests with the Applicant to show that the Respondent will be unable to pay the costs of litigation, the evidentiary burden may shift back and forth, and indeed, in my view has shifted to the Plaintiff to show that he has the means available.
32. I say the above because the facts show that the Respondent was declared personally bankrupt in Denmark on 28th November, 1980, in Claim No. 527-IO-1996. In that matter, the insolvent estate of the Plaintiff was closed on 6th March, 1984, pursuant to section 143 of the Danish Bankruptcy Act without any distribution to the creditors.



33. Once again, the Plaintiff entered into an Individual Voluntary Arrangement (IVA), which are for the avoidance of doubt, insolvency proceedings, in the UK, from period of 1996 to 2003. A declaration of Bankruptcy and insolvency proceedings (IVA) on two occasions, in two separate jurisdictions, within a span of ten years of each event, and lasting for a period of 11 years in total, is certainly, in my view a reasonable cause for concern as regards that person's financial status and ability to meet costs. Finally, and more recently, the Applicant pointed out that the Respondent has been unable to pay certified costs in Civil Appeal No. 77 of 2012 demonstrating his continued inability to pay debts, which necessitated the filing of the present application.
34. Going back to the argument relating to 'setting off'; even if this court were to offset the costs arising from the failure of each of the parties to pay costs in previous proceedings, I cannot turn a blind eye to the facts as stated above, especially in the absence of any financial information available to this court as proof of the Respondent's present financial status and ability.
35. I am however cognizant of the delay on the part of the Applicant to pursue the present application, which is 11 years since the suit was filed. The delay has not been explained and is inordinate. In *Shakhalaga Khwa Jirongo & Sololo Outlets v Board of Trustees of National Social Security Fund* [2005] KEHC 910 (KLR), the court stated that an application for security of costs should be brought soon after the suit is filed, and that if brought later, there ought to be sufficient explanation for the delay. This was not done.
36. Further, I take note that the Defendants have not denied that they also owe the Plaintiff taxed costs arising out previous litigation between the parties. The argument for offset is therefore with a basis and has some merit.
37. I have also read the pleadings and while I caution myself not to make any determination at this stage, it is evident that the same raise triable issues. Noting that the test in an application for security for costs, is not whether the Plaintiff has established a prima facie case, but whether the Defendant has shown a bona fide defence (see *Shah & Others v Manurama Limited & Others* (2003) E.A 294, *Cancer Investments Limited v Sayani Investments Limited* (2010) eKLR and *Jayesh Hasmukh Shah v Narin Haira & Another* [2015] eKLR). I am of the view that the trial is likely to include substantial time and costs on the part of all the parties.
38. However, it is trite that security for costs ought not be used as a sword to stifle a claim, or to prevent a legitimate claimant from access to justice, but rather, as a shield, and therefore an award of the same must balance the interests of the parties and create a level playing field. Therefore, based on the facts set out above, while I am inclined to grant an order for security of costs, I find the amount sought by the Applicant to be excessive, and likely to stifle the Plaintiff's claim if ordered. Moreover, the Applicant did not explain, or provide the court with a breakdown as to how it arrived at the figure, which was USD. 1,500,000/=, or approximately Kshs. 200,000,000/= based on the current rate of exchange.
39. While I do not intend to engage in a pre-emptive exercise in taxation, which is not the role of this court, guided by the legal principles as stated above, and considering the value of the subject matter; the period of time the parties have been engaged in litigation; the present stage of proceedings; and the circumstances of the case; I am of the view that an order for security in the sum of Kshs. 40,000,000/= (Forty Million) would be just and equitable.

Conclusion and Disposition

40. Based on the reasons set out above, I find and hold that the application is with merit.



- 41. Security for costs in the sum of Kshs. 40,000,000/= (Forty Million) is hereby ordered and shall be paid by the Plaintiff/ Respondent.
- 42. The said sum shall be deposited into a joint interest earning account in the names of the advocates on record for the Plaintiff and the 1st and 2nd Defendants within the next 45 days of the date of this Order, and shall remain on deposit pending the hearing and determination of the present suit.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

-For the Plaintiff
-For the 1st Defendant
-For the 2nd Defendant
-For the 3rd Defendant

